APPENDIX "A"

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C., 20543

October 4, 1967

Richard R. Barnes, Esq
P. O. Box 306
Wichita, Kansas 67201

Re: Kansas City Southern Rwy Co. v. Johnston
No. 657, October Term, 1967

Dear Mr. Barnes:

In reply to your letter of September 29, 1967, you are informed that the above captioned petition for writ of certiorari was received and filed on September 27, 1967. Insofar as this office is concerned, the petitioner had sufficiently complied with Rule 21, to have the case placed on the docket.

Very truly yours,

John F. Davis, Clerk
By /s/ Michael Rodak, Jr.
Michael Rodak, Jr.
Deputy Clerk

MRJr:njf

APPENDIX "B"

Abstract of Testimony of Lonnie R. Malone

Defendant's sole evidence on the issue of liability was the testimony of Lonnie R. Malone, a car foreman for the defendant (CM-163) (CM-175).

Witness Malone testified that his job with defendant consisted of supervising the maintenance and repairs of freight cars for the past 15 or 16 years (CM-164). This witness had no personal knowledge of the facts of this occurrence nor did he have any knowledge concerning the character of defendant's track at Howard, Kansas (CM-171).

It was apparent that defendant intended to use this witness as an expert who would answer a hypothetical question based on the facts in evidence. *No complete hypothetical question was ever asked of this witness based upon the facts in evidence in this case* (CM-164-CM-169). The following colloquy between defendant's counsel and witness Malone illustrates that nothing but conjecture and surmise was obtained from this witness (CM-164):

> "Q. Do you have an opinion as to what causes the separation and movements of cars in movement of trains?
>
> "A. Yes, sir.
>
> "Q. I ask you sir, if you will, explain to the court and jury what can cause a separation of a train as to a coupler?
>
> "A. Well, some object can strike it underneath—the lock pin, causing it to raise and the couple to open allowing the cars to separate, * * *.
>
> "Q. * * * you said a foreign object, can you state in your experience with railroading what has been some of these things that cause it?

"A. It could be a *piece of tie*, a rock—*large* rock—*angle bar*—something of that nature.

"Q. Something onto the railroad track bed or picked up by a wheel?

"A. Yes, sir.

* * *

"Q. What other things activate the pin?

"A. Air hoses or air hoses becoming uncoupled * * * the glad hand holder.

"Q. What is a glad hand?

"A. Metal coupling* * * It is on this end of this hose. * * *

* * *

"Q. What is the distance * * * after the hose drops what is the distance that the hose from your front side would reach forward and swing and hit?

* * *

"A. Approximately 26 or 27 inches.

"Q. Would it hit the pin or open a couple?

"A. *It could.*

* * *

"Q. Are there other things that cause a pin to become disengaged?

"A. Rough track causing the cars to bounce up and down causing this pin to raise.

(There was no evidence that the track was rough at the scene of this occurrence (CM-171)).

"Q. I will ask you sir if there is a difference in the susceptibility of this occurring as to whether or not it is in a pulling position or when slack?

"A. I would say sir we would have to have slack. If the knuckles are tight they are tight against your lock and your pin and it will not raise. *There has to be some slack.* (The evidence in the case indicated the slack was 'bunched' as the train came down Rich Mountain. CM-106)."

Cross-Examination of Witness Malone

Witness Malone testified that he had never been employed in train service and had always worked in defendant's shops (CM-169, 170).

No testimony of any probative value can be gleaned from this alleged expert witness as illustrated by the following colloquy (CM-171):

"Q. How high is that railroad at Howard?

"A. I don't know where Howard is.

"Q. Do you know anything about the Kansas City Southern track there?

"A. No, sir.

"Q. Don't you know generally the track has a nice smooth ballast and doesn't have rocks around where they could flip them up—do you know that's true?

"A. I know they have nice ballast.

* * *

"Q. So 124 cars and seven engines would go across this place on high rails as much as seven or eight inches above the ballast and 100 cars go across and you think the 101st might pick up a rock?

"A. I think it's possible.

"Q. Or an angle bar?

"A. Yes.

"Q. Or you think an air hose may have done it?

"A. I think it could.

* * *

"Q. Do you know whether anyone with a shop like yours examined these couplers?

"A. The engineer—traveling engineer handle those things."